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To be argued by
JAMES B. DONOVAN

No. [redacted] 2

IN THE

Supreme Court of the United States

OCTOBER TERM, 1958

RUDOLF IVANOVICH ABEL, also known as "Mark" and also known as Martin Collins and Emil R. Goldfus,

Petitioner,

v.

UNITED STATES OF AMERICA.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT.

BRIEF FOR PETITIONER.

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November 25, 1958.

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v.

UNITED STATES OF AMERICA,

Respondent.

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BRIEF FOR THE PETITIONER.

Opinions Below.

The opinion of the Court of Appeals (R. 837-865) is reported at 258 F. 2d 485. The opinion of the United States District Court for the Eastern District of New York (R. 239-246) is reported at 155 F. Supp. 8.

Jurisdiction.

The judgment of the Court of Appeals was entered on July 11, 1958 (R. 865). The petition for a writ of certiorari

was filed on August 8, 1958 and was granted, with respect to two questions, on October 13, 1958 (R. 866). The jurisdiction of this Court is based upon 28 U. S. C. 1254(1).

Questions Presented.

1. Whether the Fourth Amendment to the Constitution of the United States is violated by a search and the seizure of evidence without a search warrant, after an alien suspected and officially accused of espionage has been taken into custody for deportation, pursuant to an administrative Immigration Service warrant, but has not been arrested for the commission of a crime?

2. Whether the Fourth and Fifth Amendments to the Constitution of the United States are violated when articles so seized are unrelated to the Deportation Warrant and, together with other articles obtained from such leads, are introduced as evidence in a prosecution for espionage?

Constitutional and Statutory Provisions.

The constitutional and statutory provisions involved are Amendments IV and V to the Constitution of the United States; 18 U. S. C. 794 ("Gathering or delivering defense information to aid a foreign government"); 18 U. S. C. 793 ("Gathering, transmitting or losing defense information"); 18 U. S. C. 951 ("Agents of foreign governments"); and 18 U. S. C. 371 ("Conspiring"). All are printed in Appendix "A" to this brief, *infra*, pp. 32 to 37.

Statement.

Petitioner was indicted on August 7, 1957 in the Eastern District of New York upon charges of conspiring to commit espionage on behalf of Soviet Russia. Three separate counts charged conspiracies to violate 18 U. S. C. 794, 793 and 951 (R. 7-19).

Following a jury trial before Hon. Mortimer W. Byers, D. J., petitioner, the only defendant, was convicted on all counts. On November 15, 1957 he was sentenced to thirty years imprisonment and fined $3,000 (R. 829, 834). The Court of Appeals for the Second Circuit affirmed his conviction on July 11, 1958 (R. 865). On October 13, 1958 this Court granted a petition for a writ of certiorari to the Court of Appeals, with respect to two questions pertaining to an alleged violation of petitioner's rights under the Fourth and Fifth Amendments to the Constitution of the United States (R. 866).

The Facts.

All facts in the following narrative are taken exclusively from statements by U. S. Government officials and witnesses, or were uncontradicted in the proceedings below.

A. Investigation of Hayhanen and Abel by F. B. I.

Petitioner is a man called Abel, who for some years maintained an artist's studio on Brooklyn Heights while living in New York at various inexpensive lodgings (R. 543, 545, 633-636). Apart from the instant charges, his reputation for honesty and integrity has been characterized by American friends and neighbors as "beyond reproach" (R. 553, 568, 711).

In early May, 1957 one Reino Hayhanen informed the American Embassy in Paris that since 1952 he had been acting in the United States as a secret espionage agent for the U. S. S. R. and that since 1954 he had assisted here a Soviet espionage one "Mark", whose true name he did not know but whom he identified at the trial as the petitioner Rudolf Ivanovich Abel (R. 439-444, 289, 377). According to Hayhanen, the man was the "resident agent" in the United States with the military rank of Colonel (R. 289, 290, 310).

Based upon Hayhanen's story, F. B. I. agents immediately commenced an intensive investigation of the alleged espionage activities of Abel; shadowing him, watching his studio in Brooklyn and occupying the hotel room next to his at the Hotel Latham in Manhattan (R. 56, 137-138, 644-657). During this period (May-June 20, 1957) the agents obtained through Hayhanen testimony and numerous exhibits which were later introduced as evidence of espionage at Abel's trial. See Appendix "B" to this brief, "Evidence of Espionage Obtained by the Department of Justice Prior to Abel's Detention for Deportation on June 21, 1957" *infra*, pp. 38-40. However, Hayhanen was not arrested, nor did the Department of Justice seek to obtain a warrant of arrest or a search warrant relating to Abel.

B. Preparations for Solicitation of Abel by F. B. I.

On June 20, 1957 at 3:00 or 4:00 o'clock in the afternoon, three Immigration and Naturalization Service agents met with four F. B. I. agents at the F. B. I. headquarters in Washington (R. 158-160). During the two hours they were there, the I. N. S. agents were given an F. B. I. report on Abel as a suspected Soviet spy; they also were instructed to and did prepare an Immigration detention warrant, take

it to New York and call F. B. I. headquarters there (R. 92, 96, 124-5, 132, 161-5). [The substance of the F. B. I. report has been requested by, but remains unknown to, the defense (R. 133, 152-157). It is part of the Record in this Court, under seal (236-238)].

Around midnight that night four I. N. S. agents met with eight F. B. I. agents at F. B. I. headquarters in New York, having with them the detention warrant which now had been formally signed by the I. N. S. District Director in New York (R. 97-99, 134). The I. N. S. agents spent the night at F. B. I. headquarters and proceeded early next morning in F. B. I. cars to the Hotel Latham, where Abel was living. There six F. B. I. agents were waiting for them; the F. B. I. had previously taken occupancy of the room adjoining 859, in which Abel lived (R. 100-101, 137).

The F. B. I. agents had been instructed to "solicit" Abel's "cooperation" with respect to his activities (R. 175). If he did cooperate, they were to call their F. B. I. superior in New York and "relate to him the degree of cooperation being exhibited" (R. 184-5). If he refused to cooperate, they were to direct the I. N. S. agents to arrest him (R. 185). The I. N. S. agents had agreed with the F. B. I. to take Abel into custody only if he did not cooperate with the F. B. I. (R. 191).

C. Unsuccessful Solicitation of Abel by F. B. I.

About 7:00 A. M. that morning (June 21, 1957) F. B. I. Agents Gamber and Blasco knocked on Abel's door and "pushed" into the room (R. 175). Abel was naked (R. 176). Shortly thereafter F. B. I. Agent Phelan joined them (R. 177). They explained the counter-espionage jurisdiction of the F. B. I. and stated that their purpose in questioning him was concerning such matters (R. 179-180). They said: "Colonel, we have received information concerning your

involvement in espionage" (R. 183-184). For approximately a half-hour they unsuccessfully attempted to question Abel about his activities in the United States, calling him "Colonel" (R. 182-3). He was not warned of his constitutional rights, because the F. B. I. regarded the meeting as "an interview to solicit his cooperation" (R. 185-187), but was told that if he failed to cooperate "he would be placed under arrest prior to leaving the room" (R. 183).

D. Detention by I. N. S. "For Deportation"; the Searches and Seizures.

Shortly after 7:30 a. m. the F. B. I. agents recognized the futility of further discussion at that time. One left the room and motioned to the waiting I. N. S. officers to serve their detention warrant and take Abel into custody (R. 139-140, 189-190). The officers did so and then proceeded, in the presence of the F. B. I. agents, to pack up all Abel's personal effects in the room (R. 65, 68). They found no weapons or "evidence of alienage" (R. 142, 150) but seized over 200 items belonging to Abel (R. 31, 37-45). A list of the items seized by the I. N. S. agents at that time which were later introduced as evidence at Abel's espionage trial, or were used to obtain exhibits introduced at the trial, is set forth in Appendix "C" to this brief, *infra*, pp. 41-45.

Subsequently that day the over 200 items seized by Immigration officers were "displayed to Special Agents of the Federal Bureau of Investigation" and more thoroughly searched at Immigration Headquarters (R. 48, 54, 59-60, 669). On the basis of some of the items so seized by Immigration officers, but which were not used at the trial, F. B. I. agents then obtained two search warrants (R. 47-55, 247-274) relating to Abel's studio in Brooklyn. There more than 300 other items were seized, some of which were used at the trial as set forth in Appendix "C" hereto, *infra*, pp. 44-45.

After the Immigration officers had taken Abel into custody at the Latham, an F. B. I. agent obtained money from him and "checked him out" down at the hotel desk (R. 144, 703). His rent so paid entitled him to possession of the room until 3:00 p. m. that afternoon (R. 660). However, shortly after Abel was removed from the hotel, by a back door in handcuffs, F. B. I. agents with permission from the hotel owner conducted another search of Abel's room. The F. B. I. at that time seized over 30 additional items (R. 46, 693-695), 5 of which were introduced as Government exhibits at Abel's espionage trial (G. Ex. 87, 88, R. 694, 724, 726; G. Ex. 97, 98, 98A; R. 727-731). The Government has contended that these items were not illegally seized because, by being checked out of the room, Abel had "voluntarily abandoned them." However, no consent by Abel to any search was sought or obtained (R. 166, 705).

E. Deportation to Texas for Further Solicitation by F. B. I. and Interrogation.

When Abel was taken into custody at the Latham, he was given a copy of a "Warrant for Arrest of Alien" and an "Order to Show Cause and Notice of Hearing", which stated that he would have a hearing, for deportation from the United States, before the District Director of I. N. S. at its New York headquarters, 70 Columbus Avenue, New York City at 2:30 p. m. on July 1, 1957 (R. 33-35).

However, after leaving the Latham Abel was taken to the I. N. S. headquarters, fingerprinted and then driven to an airport in Newark, New Jersey where he was placed on a special plane. He and two Immigration agents were the only passengers and he was not told his destination (R. 30). After a thirteen-hour flight they arrived at a maximum security camp for aliens at McAllen, Texas where he was placed in a solitary cell (R. 30, 60).

F. B. I. agents (including Gamber and Blasco, who had questioned him at the Latham) and I. N. S. officers immediately began an interrogation of Abel that lasted approximately four weeks (R. 30, 31, 60). On the third day of questioning, Abel stated that he was a Russian citizen illegally in this country; he then was permitted to see counsel and was given a deportation hearing in the prison by I. N. S. (R. 61). At his own election he was ordered deported to the U. S. S. R., on June 27, 1957 (R. 31, 689-693). The F. B. I. interrogation continued thereafter for several weeks; although Abel was offered by the F. B. I. a government job and other inducements, he continued to refuse to "cooperate" (R. 31).

F. Return to Brooklyn for Trial.

On August 7, 1957 Abel learned in his Texas cell that he had been indicted in Brooklyn on charges of Soviet espionage, including the capital offense of conspiring to transmit national defense information (R. 32). That day, for the first time, a criminal warrant for his arrest was issued and Abel for the first time was taken before a court. No warrant to search his room at the Latham or to seize the articles found therein, has ever been issued.

Following the denial of various defense motions, Abel was ordered to trial on October 3, 1957. A jury was picked, then excused for a week granted defense counsel to prepare for trial. A hearing on Abel's motion to suppress the Latham evidence was held during this week.

At the trial, over timely objections by defense counsel, evidence obtained as a result of the Latham seizure was introduced (see schedules in Appendix "C" to this Brief, *infra*, pp. 41-45). The jury thereafter returned its verdict of guilty on all counts in the indictment (R. 821).

Summary of Argument.

Counsel respectfully urge that the judgment below must be reversed because fundamental rights guaranteed to all under the Fourth and Fifth Amendments to the Constitution have been denied to petitioner.

On June 20, 1957 the Department of Justice had testimony and corroborating evidence which would give a reasonable person probable cause to believe that Abel was a Soviet espionage agent (see Appendix "B" hereto *infra*, pp. 38-40). Instead of obtaining a warrant for his arrest and a search warrant (which would have required prompt public disclosure of his seizure) the Department of Justice resorted to a subterfuge, in a gamble that Abel could be persuaded to cooperate with the F. B. I.

By pre-arrangement with the F. B. I., the Immigration Service issued an administrative order, unsupported by oath or affirmation and returnable to themselves, for Abel's detention for deportation, agreeing that it would not be served except at the direction of the F. B. I. Meanwhile, all plans were made to have Abel and his effects vanish from public knowledge if he refused to "cooperate" with the F. B. I. Both agencies (F. B. I. and I. N. S.) are component parts of the Department of Justice.

On the morning of June 21, 1957 the plan was put into effect. The F. B. I. without any process raided Abel's hotel room and for a half-hour solicited his "cooperation". He refused to answer their questions. He and all his effects then were seized by I. N. S. officers, waiting outside for the F. B. I. signal. He was removed from the hotel by a back door and after fingerprinting he was placed on a special plane, flown to a remote Texas prison and placed in a solitary cell. After three days of questioning by F. B. I.

and I. N. S., he saw a lawyer, received a brief deportation hearing in the prison and elected to be deported to the U. S. S. R. For weeks following, he steadfastly refused to "cooperate". Meanwhile, all his effects had been thoroughly searched in New York by the F. B. I. and I. N. S. On August 7, 1957 he was indicted in Brooklyn on the capital offense of conspiring to steal national defense secrets. He was convicted after a trial in which evidence obtained as a result of the Latham seizure was used against him. (See Appendix "C" hereto, *infra*, pp. 41-45.)

Such a search and seizure, lacking what this Court has called "good faith", violates the Fourth Amendment under the reasoning of both the majority and the minority of the Court in *Harris* v. *United States*, 331 U. S. 145 (1947). The use of a subterfuge, equivalent to stealth, is forbidden under similar principles. *Gouled* v. *United States*, 255 U. S. 298 (1921). Moreover, in the case at bar, almost all the items seized for later search cannot even be claimed to relate to the Immigration warrant. *Kremen* v. *United States*, 353 U. S. 346 (1957); *Harris* v. *United States*, *supra*.

But even more fundamental, we contend, is the rule applicable to the case at bar that although a person is suspected of being an alien illegally in the United States he cannot be subjected to a general search and seizure, and thereafter prosecuted for a crime on evidence so obtained, unless the search and seizure conform to the requirements of the Fourth Amendment. In the instant case the administrative process employed by the Government lacked all the safeguards required by the Amendment. *Nathanson* v. *United States*, 290 U. S. 41 (1933); *cf. Giordenello* v. *United States*, 357 U. S. 480 (1958).

ARGUMENT.

I.

The Fourth Amendment was violated when the Department of Justice, pursuing a counter-espionage objective, searched and seized a suspected espionage agent and his effects by the subterfuge of an alien detention warrant, instead of arresting the suspect for the commission of a crime and otherwise proceeding with due process of law.

> *"Freedom under law is like the air we breathe. People take it for granted and are unaware of it—until they are deprived of it. The clearest way to show what the rule of law means to us in everyday life is to recall what has happened when there is no rule of law. The dread knock on the door in the middle of the night . . ."*
>
> DWIGHT D. EISENHOWER, "U. S. Law Day" Address, May 1, 1958.
> "Time", May 5, 1958, p. 11.

To understand what occurred in Room 839 of the Hotel Latham on the morning of June 21, 1957 it is essential to bear in mind that the Federal Bureau of Investigation has two distinct functions. First, it is a law enforcement or police agency and second, it is a component part of our national intelligence forces dealing with internal security and counter-espionage in the United States. Compare 5 U. S. C. 299, with 5 U. S. C. 300; 50 U. S. C. 403 (a)(e);

Its internal security function is recognized as such by the F. B. I. (R. 179, 180, 195) and its procedures are governed accordingly. In the virtually official "The F. B. I.

Story" by Whitehead (1956) the Foreword is by J. Edgar Hoover, Director of the F. B. I., who states therein that (a) the F. B. I. has "complete confidence in his (the author's) integrity, ability and objectivity", and (b) "the facts reported are supported by the Bureau's record." In "The F. B. I. Story" the author states (R. 62-64):

> "The F. B. I. conducts two types of security investigations—one to uncover admissible evidence to be used in the prosecution of an individual or group in federal court, the other for intelligence purposes only. The intelligence investigation is intended to identify and determine the activities of individuals who are potentially dangerous to the nation's security, thereby supplying information on which to base preventive or counterespionage action. Often clandestine methods are necessary to uncover clandestine operations, as for example, obtaining an espionage agent's diary or secret papers. The evidence in the diary may be inadmissible in federal court, but it may contain information which would enable the United States to protect itself at a later date. This is in contrast to a case where legal evidence, admissible in court, has to be obtained to convict the espionage agent of violating the laws of the United States."

It has been our contention that such a "clandestine method"* is a precise description of what the Department of Justice attempted in this case. We have not criticized their calculated gamble to grab Abel and his effects, keep his seizure secret as long as possible, and try to persuade him to aid the United States. We stated in the courts below

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* "Clandestine, adj. Conducted with secrecy by design, usually for an evil or illicit purpose." Webster's International Dictionary, 2d Ed. (1950).

that from a counter-espionage viewpoint, the decision seems prospectively sound (R. 25, 26). But we maintain that the Department of Justice, having elected to gamble that Abel would "cooperate" and then having lost, cannot subsequently seek to reverse its steps, prosecute Abel on evidence "inadmissible in federal court" and pay lip service to due process of law.

The point was over-ruled by the courts below, the District Judge commenting during the hearing: "I think it is the job of the F. B. I. to bring to light information concerning violations of the law and I don't think it is part of the Court's duty to tell them how they should function" (R. 131).

With this background we may recapitulate the pertinent facts and understand their true significance in relation to the issues before this Court.

1. Investigation of Hayhanen and Abel by F. B. I.; the Decision on June 20, 1957.

We have noted that in early May, 1957 Hayhanen informed the American Embassy in Paris that since 1952 he had been acting in the United States as an intelligence agent for the U. S. S. R. and that since 1954 he had assisted here in Soviet espionage one "Mark" whom he later identified as Abel (R. 439-444, 289, 377, 488). Based upon his story, the F. B. I. promptly commenced an intensive investigation of the alleged espionage, watching Abel's Brooklyn studio, shadowing him and occupying the hotel room next to his at the Hotel Latham in Manhattan (R. 56, 137-138, 644-657). Hayhanen meanwhile was "cooperating" in New York and had directed the F. B. I. to various espionage materials which he accused Abel of having given to him (R. 445, 446, 507-525, 582-586).

Thus in June, 1957 the Department of Justice possessed substantial evidence that in Room 839 of the Latham lived an undercover director of Soviet espionage in the United States, who had illegally entered the country. The Department—and any reasonable person—accordingly had probable cause to believe that various federal crimes had been committed by the occupant of Room 839 and that legal warrants for his arrest and a search could be obtained. See Appendix "B", *infra*, pp. 38-40. *Brinegar* v. *United States*, 338 U. S. 160 (1949); *Johnson* v. *United States*, 333 U. S. 10 (1948).

However, the Department also knew that the accomplice Hayhanen had already "cooperated" with our counter-espionage agencies and that it was possible that the man in Room 839, after many years in the United States, might follow a similar course. According to Hayhanen, the man was the "resident agent" with the high military rank of Colonel (R. 289, 290, 310). If he could be induced to "cooperate", a remarkable coup in counter-espionage would be possible: at the minimum, complete knowledge of a major Soviet spy apparatus in the United States, with names of its agents and sources, keys to ciphers, etc.; at the maximum, creation of an important "double agent" who for an indefinite period could mislead and disrupt Soviet intelligence (affecting military and foreign policy decisions of the U. S. S. R.) while secretly serving the United States.

A decision on the highest policy level had to be made by the Department of Justice, with respect to the man in Room 839:

> (1) Should the Department, as a law enforcement agency, obtain a warrant for his arrest on espionage or other criminal charges, and also a search warrant? If so, the man could be seized and his room searched but he would have to be publicly

brought before the nearest available U. S. Commissioner or Federal Judge "without unnecessary delay", be entitled to consult counsel at once, and then be remanded to a federal prison.

(2) On the other hand, would it be more in the national interest for the Department, exercising its counter-espionage functions, to seize the man and his effects in a clandestine manner, conceal his capture from his co-conspirators as long as possible, and meanwhile seek to induce him to come over to our side?

The final decision was made on June 20, 1957. At the request of our counter-intelligence agencies (R. 75, 76, 163, 164) and by orders from Washington, local Immigration officials in New York that night signed a "warrant of arrest" and "order to show cause" returnable to themselves and previously prepared in Washington (R. 33-37, 95-96, 163). They agreed that the papers would be served only if Abel refused to "cooperate" with the F. B. I. (R. 184, 185, 188, 191). A decision had been made to institute deportation proceedings and not to prosecute criminally for illegal entry, at that time (R. 218-220).

Immigration and Naturalization Service of course is a component part of the Department of Justice, as is the Federal Bureau of Investigation, both being under the Attorney General. See Reorganization Plan No. 2 of 1950, 15 F. R. 3173, 64 Stat. 1261.

2. Unsuccessful Solicitation of Abel by F. B. I.

At approximately 7:00 a. m. on the morning of June 21, 1957 F. B. I. and Immigration agents, acting in unison according to a prearranged plan (R. 136-138, 165) surrounded Room 839 in the Latham. Two F. B. I. agents knocked on the door and, when Abel opened it, "pushed" into the room (R. 175). Abel was naked (R. 176). Shortly

thereafter, a third F. B. I. agent entered the room (R. 177). They explained the internal security jurisdiction of the F. B. I. and stated that their purpose in questioning him was concerning such matters (R. 179, 180). They said: "Colonel, we have received information concerning your involvement in espionage" (R. 183-184). For approximately a half-hour they questioned Abel about his activities in the United States, addressing him as "Colonel" (R. 178, 182, 183). He refused to "cooperate", although cooperation was "solicited" (R. 183). He was not warned of his constitutional rights, because the F. B. I. regarded the meeting as "an interview to solicit his cooperation" (R. 185-188), but was told that if he failed to cooperate "he would be placed under arrest prior to leaving the room" (R. 183).

The F. B. I. has no operative jurisdiction with respect to illegal residence in the United States (R. 194).

3. Detention "for Deportation" by I. N. S.; the Searches and Seizures.

Shortly after 7:30 a. m. the F. B. I. agents recognized the futility of further solicitation at that time. One left the room and motioned to the waiting Immigration officers to arrest Abel (R. 139-140, 189-190). The Immigration officers did so and then proceeded, in the presence of the F. B. I. agents (R. 59, 142, 190) to seize all Abel's personal effects in the room. At the hearing below, the Immigration officers testified that they were looking for weapons and "evidence of alienage" (R. 65, 68) but admitted that they found none (R. 37-46, 142, 150).

Abel occupied Room 839 by the week and the rent was due the next day (R. 659). An F. B. I. agent took money from Abel and "checked him out" down at the hotel desk (R. 144, 703). Even so, his rent was paid so that he was entitled to possession of the room until 3:00 p. m. that

afternoon (R. 660). After Abel's effects were packed, he was handcuffed and taken out a rear door of the hotel at approximately 8:00 a. m. (R. 109, 118). In a waiting car he was driven to local Immigration headquarters for fingerprinting and then was taken to Newark Airport. Meanwhile, his effects were being more thoroughly searched by F. B. I. and I. N. S. at Immigration headquarters (R. 48, 54, 59-60, 669).

Shortly after Abel was removed from the Latham, at about 9:00 a. m. (R. 660) F. B. I. agents obtained the key to Room 839 from the hotel desk, returned to the room for another search and seized various objects (R. 693-695). Based upon the foregoing searches (R. 47, 53, 248, 265) the F. B. I. subsequently obtained two search warrants relating to the Brooklyn Heights studio (R. 247, 262). No consent by Abel to any search was sought or obtained (R. 166, 705).

4. The Deportation to Texas for Further Solicitation by F. B. I. and Interrogation.

At approximately 4:15 p. m. that day Abel departed from Newark Airport in a special plane, guarded by two Immigration agents (R. 30, 60). Thirteen hours later he arrived in McAllen, Texas, where he was placed in segregated confinement within "maximum security" detention (R. 58, 60). After a few hours sleep he was interrogated from 9:00 a. m. until 4:00 p. m. by Immigration officers (R. 30). The F. B. I. agents who first entered Abel's hotel room the day before thereafter commenced their interrogation of the prisoner (R. 30, 60, 61).

On the third day of interrogation Abel stated that he was a Russian citizen illegally in the United States (R. 61). He then was permitted counsel, given a deportation hearing by Immigration and, at his own election, was ordered

deported to the U. S. S. R. on June 27, 1957 (G. Exhibit 86; R. 689-693).

For three weeks more the F. B. I. agents continued to question him and to seek his "cooperation" (31). According to Abel—and his statements in this respect were never contradicted in the trial court—the F. B. I. agents offered as inducements some comfortable quarters and even employment with another U. S. Government agency (31). He steadfastly refused to "cooperate."

5. Return to Brooklyn for Trial.

On August 7, 1957 Abel was indicted in Brooklyn for the capital crime of espionage. On that day, for the first time, a criminal warrant for Abel's arrest was issued and Abel for the first time was taken before a court, which ordered his return to Brooklyn for trial. No warrant to search his room at the Latham or to seize the articles found therein has ever been issued.

The foregoing is a summary of the factual background against which this Court is to determine whether the Fourth and Fifth Amendments have been violated in the case at bar.

POINT I(A).

The search in the case at bar lacked "good faith" as defined by this Court, because the true objective of the Department of Justice was to uncover evidence of Soviet espionage, rather than to determine Petitioner's status as a deportable alien.

> *"This challenge is now before us. All who believe in the virility of our birthright should stand united to see to it that we fight effectively and at the same*

time preserve our freedom. To this end we must guard jealously the Bill of Rights and the civil liberties which are guaranteed by the Constitution and the traditions of this country . . . It will be a temptation in time of war to use the threat of our national existence to enforce points of view which are fundamentally hostile to the very freedoms we are fighting to defend."

James Bryant Conant,
"Our Fighting Faith"
(Cambridge, 1942), pp. 15-17.

The Fourth Amendment to the Constitution of the United States provides:

> "The right of the people to be secure in their persons, houses, papers and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath, or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."

It is only unreasonable searches that are prohibited by the Fourth Amendment. *United States* v. *Rabinowitz*, 339 U. S. 56 (1950); *Carroll* v. *United States*, 267 U. S. 132 (1925). Petitioner contends that the search of his room was unreasonable within the meaning of the Fourth Amendment in that, although it was made pursuant to a deportation warrant issued by the Immigration and Naturalization Service, its true objective actually was to uncover evidence relating to the crime of espionage, for use by U. S. counter-espionage forces if the accused would "cooperate" and, if that failed, for use in prosecuting him for that crime.

The law is well established that a search without a search warrant may be made when it is incidental to a lawful arrest for a crime. *Harris* v. *United States*, 331 U. S. 145 (1947); *Go-Bart Importing Co.* v. *United States*, 282 U. S. 344 (1931). That such a search may extend beyond the person of the one arrested, to include the premises under his immediate control, is also clear. *United States* v. *Rabinowitz*, *supra*; *Agnello* v. *United States*, 269 U. S. 20 (1925).

However, searches made incidental to lawful arrests for crimes are not permitted without limitation. Thus, law-enforcement officers may not conduct an exploratory search for evidentiary materials tending to connect the accused with some crime, for reasons basic to personal freedom, *United States* v. *Lefkowitz*, 285 U. S. 452 (1932); *Go-Bart Importing Co.* v. *United States*, *supra*; Frankel, "Concerning Searches & Seizures", 34 Harv. L. Rev. 361 (1920). Further, the objects sought for must be either (1) the instrumentalities and means by which the crime charged in the warrant is committed, (2) the fruits of such crime, (3) weapons by which escape of the person arrested might be effected, or (4) property the possession of which is a crime. *Harris* v. *United States*, *supra*; *Agnello* v. *United States*, *supra*. The provisions of the Fourth Amendment against unreasonable searches also apply to hotel rooms. *United States* v. *Jeffers*, 342 U. S. 48 (1951).

(i) *The Harris Case.*

In the *Harris* case, *supra*, agents of the Federal Bureau of Investigation obtained two warrants to arrest the defendant, charging him with mail fraud and violation of the National Stolen Property Act, in connection with the forging of checks. The warrants were served upon defendant

in his apartment and the agents proceeded to search the premises, incidental to the arrest. In the course of the search they discovered and seized a quantity of altered Selective Service documents, unconnected with the crimes charged in the arrest warrants. The defendant subsequently was indicted and convicted for possession of the altered Selective Service documents.

This Court affirmed the conviction in a 5-4 decision. The majority and minority opinions of the Court comprise probably the most comprehensive study of the existing law, relating to permissible and prohibited searches and seizures incidental to arrest for a crime, that has been written.

In affirming the conviction, the majority reiterated the existing law that searches incidental to a lawful arrest cannot be of a general exploratory nature. The Court stressed the finding of the District Court that the search "was specifically directed to the means and instrumentalities by which the crimes charged had been committed, particularly the two cancelled checks . . ." (p. 153) and that "the agents conducted their search in good faith for the purpose of discovering the objects specified . . . The search which followed the arrest was appropriate for the discovery of such objects. Nothing in the agents' conduct was inconsistent with their declared purpose" (p. 153). It was on this "good faith" basis alone that this Court upheld the validity of the search in that case.

In the instant case, petitioner was detained pursuant to an administrative Immigration warrant for deportation from the United States. It contains no provision for any search or seizure, was not based upon a finding of probable cause by an independent officer, and was unsupported by oath or affirmation. The warrant was issued at the request

of the F. B. I. (R. 75, 76, 163, 164); it was served at their direction (R. 138-140), and it had been previously agreed that it would be served only if petitioner refused to "cooperate" with the F. B. I. (R. 184, 185, 191). Agents of the Federal Bureau of Investigation were present when I. N. S. officers packed up all Abel's effects (over 200 items); they conducted their own search as soon as the Immigration officers left, although they had no operative jurisdiction over the offense charged in the warrant (R. 46, 693-695, 194). The Immigration officers stated that they were looking for weapons or "evidence of alienage" (R. 65, 68) but admitted that they found none (R. 37-46, 142, 150). F. B. I. agents participated in the complete search later conducted at I. N. S. headquarters (R. 48).

The evidence is overwhelming that the true objective of the search in the instant case was to uncover evidence of espionage, under the guise of a warrant to arrest pending deportation proceedings. The Government cannot possibly claim that F. B. I. agents were seeking evidence of petitioner's status as a deportable alien. Nor can the thin pretense that although they were present they did not participate in the search, justify the conduct of the Government in the instant case. *Cf. Byars* v. *United States*, 273 U. S. 28 (1927); see also uncontradicted public statement by the Commissioner of Immigration:

> "We were well aware of what he was when we picked him up. Our idea at the time was to hold him as long as we could" (R. 76).

Because of this lack of "good faith", the search in this case falls squarely within the purview of the *Harris* decision and therefore is unreasonable under the Fourth Amendment. Nor can an illegal search be validated by

the discovery of evidence which may legitimately be subject to seizure. *Taylor* v. *United States*, 286 U. S. 1 (1932); *Byars* v. *United States*, 273 U. S. 28 (1927); *Amos* v. *United States*, 255 U. S. 313 (1921).

Since the search in the instant case was invalid, all property obtained as a result thereof should have been suppressed and its use as evidence in the espionage trial violated the Fifth Amendment. *Agnello* v. *United States*, 269 U. S. 20 (1925); *Weeks* v. *United States*, 232 U. S. 383 (1914); *Boyd* v. *United States*, 116 U. S. 616 (1886).

(ii) *Search and Seizure by Subterfuge.*

Under the *Harris* rule, searches and seizures violate the Constitutional ban if it is shown that "good faith" is lacking in police who possess a legally obtained warrant of arrest for any crime, based upon probable cause and returnable in open court. But in the instant case the Department of Justice deliberately employed for its own purposes an administrative warrant, issued by and returnable to themselves, in order to avoid public process. Such constitutes search and seizure by subterfuge, equivalent to the use of clandestine stealth.

In *Gouled* v. *United States*, 255 U. S. 298 (1921) a search and seizure of evidence by stealth, arranged by the Intelligence Department of the United States Army, was set aside by unanimous decision of this Court.* During World War I the defendant was suspected of fraud against the Government in connection with procurement contracts. A private in the Army, attached to the Intelligence Department and a business acquaintance of defendant, under

* White, Chief Justice; McKenna, Holmes, Day, Van Devanter, Pitney, McReynolds, Brandeis and Clarke, Associate Justices.

direction of his superior officers, pretended to make a friendly call upon the defendant, gained admission to his office and, in his absence, without warrant of any character, seized and carried away several documents later used as evidence to convict the defendant. This Court declared (255 U. S. at 305, 306):

> "The prohibition of the Fourth Amendment is against all unreasonable searches and seizures and if for a Government officer to obtain entrance to a man's house or office by force or by an illegal threat or show of force, amounting to coercion, and then to search for and seize his private papers would be an unreasonable and therefore a prohibited search and seizure, as it certainly would be, it is impossible to successfully contend that a like search and seizure would be a reasonable one if only admission were obtained by stealth instead of by force or coercion. The security and privacy of the home or office and of the papers of the owner would be as much invaded and the search and seizure would be as much against his will in the one case as in the other, and it must therefore be regarded as equally in violation of his constitutional rights."

A review of subsequent decisions of this Court demonstrates that it has been the elements of deliberate duplicity and stealth in the procedures employed, which have been regarded as the primary bases of the *Gouled* decision. See *Olmstead* v. *United States*, 277 U. S. 438 at 463 (1928).

In principle, we submit, there is no difference between a search or seizure conducted with stealth and one arranged by subterfuge. See *United States* v. *Valente*, 155 F. Supp. 577 (Mass. 1957); cf. *United States* v. *Haupt*, 136 F. 2d 661 (7th Cir., 1943). Each is clearly repugnant to the letter and the spirit of the Fourth and Fifth Amendments,

designed in the Constitutional Convention to assure the end of such practices, which had been bitterly experienced by the American colonists and their ancestors in England. *Harris* v. *United States, supra.*

If the Constitutional prohibition applies to the clandestine theft of a document, surely it is applicable with greater force when, by deft application of an administrative process the Department of Justice can cause a man and all his effects to disappear from public knowledge for days, in the United States in 1957.

POINT I(B).

The seizure in the case at bar was unreasonable, because the items did not relate to the Immigration warrant which was the basis of the search.

Assuming, arguendo, that the search in the instant case was valid, the seizure of all petitioner's belongings was unreasonable because only a few of the items seized could conceivably be related to the administrative warrant for his deportation. See 200 items in Record (R. 33, 37-45). His living quarters were literally stripped of all he possessed, which then was removed to I. N. S. headquarters for examination in his absence by the F. B. I. and I. N. S. See *Kremen* v. *United States,* 353 U. S. 346 (1957).

The Immigration warrant charged that petitioner was subject to deportation because he was an alien illegally in the United States. The search was incidental to this warrant, which does not charge the commission of a crime. *Harisiades* v. *Shaughnessey,* 342 U. S. 580 (1952). Yet even if the warrant did charge a crime, a review of the 200 items seized shows that few could even be argued to be (1) instrumentalities or means by which the crime had been committed; (2) the fruits of such crime; (3) weapons by which

escape of the person might be effected; or (4) property the possession of which is a crime. Virtually all items seized bore no logical relation to the "alienage" matters set forth in the Immigration warrant. Yet many were introduced as evidence in the espionage trial or were used to obtain exhibits introduced at the trial (see Appendix "C" hereto). The seizure accordingly was unreasonable and none of the items should have been used as evidence. *Gouled* v. *United States*, 255 U. S. 298 (1921); *Harris* v. *United States*, 331 U. S. 145 (1947); *Agnello* v. *United States*, 269 U. S. 20 (1925); *Boyd* v. *United States*, 116 U. S. 450 (1892).

POINT II.

Although a person is suspected of being an alien illegally in the United States, he cannot be subjected to a general search and seizure, and thereafter prosecuted for a crime on evidence so obtained, unless the search and seizure conform to the requirements of the Fourth Amendment.

Give me your tired, your poor,
Your huddled masses, yearning to breathe free,
The wretched refuse of your teeming shore:
Send these, the homeless, tempest-tossed, to me:
I lift my lamp beside the golden door.

Emma Lazarus, inscription
on the base of the
Statue of Liberty.*

Whether or not Abel is a Soviet spy, a precise legal issue is before this Court in the case at bar: whether, under our Constitution, a person whom the Department of Justice suspects to be an alien illegally in the United States, may be taken into custody, subjected to a general search and

* Quoted in Chafee, "Free Speech in the United States" (Harv. U. Press, 1946), p. 218.

seizure, and thereafter prosecuted for a crime on evidence so obtained, when the entire proceedings are based upon an administrative Immigration Service "warrant for deportation", issuable without a proper finding of probable cause, unsupported by oath or affirmation, and returnable within the Department of Justice.

The Fourth Amendment to the Constitution was intended to proscribe the issuance of general warrants and writs of assistance, which permitted exploratory searches by petty officers for evidence of any "crime". Since such writs were not returnable to an open court, the officers could enter any home at any time and make an indiscriminate search without public accountability. See the dissenting opinions in *Harris* v. *United States*, 331 U. S. 145 at 155 (1947), for a detailed history of the Fourth Amendment. As to the probable effects of permitting any relaxation of the stringent prohibitions of the Fourth Amendment, even in times of external danger, see *Colyer* v. *Skeffington*, 265 Fed. 17 (Mass., 1920), reversed on other grounds, 277 Fed. 129 (1st Cir., 1922); Chafee, Free Speech in the United States (1946); Frankel, "Concerning Searches & Seizures", 34 Harv. L. Rev. 361 (1920); Report Upon Illegal Activities of the U. S. Department of Justice, by 12 Lawyers (1920) cited by Charles Evans Hughes in Address at Harvard Law School, June 21, 1920; Hearings before Senate Judiciary Committee, 66th Cong., 3d Sess. (1921).

For these reasons, the Amendment specifies safeguards to protect against unreasonable searches and seizures, and Rule 41 of the Federal Rules of Criminal Procedure has further codified such safeguards. Accordingly, searches and seizures are normally permissible only after a warrant is issued by a judicial officer upon a finding of probable cause; it must be supported by oath or affirmation, must contain a detailed description of the place to be searched and the persons or things to be seized, and a return must

be promptly made before a judicial officer. *Jones* v. *United States*, 357 U. S. 493 (1958).

Exceptions to this fundamental rule exist. A person legally arrested for the commission of a crime may be searched. *Weeks* v. *United States*, 232 U. S. 383 (1914). The search may also extend to the premises under the immediate control of the person legally arrested, to discover and seize weapons, contraband, or the fruits or instruments of the crime for which he was arrested. *Harris* v. *United States*, 331 U. S. 145 (1947); *Agnello* v. *United States*, 269 U. S. 20 (1925). However, in all such cases there must be no question as to the validity of the suspect's arrest for the commission of a crime and specified procedures are required to effect a valid arrest. Rules 3, 4, 5, Fed. R. Crim. Proc.; *Go-Bart Importing Co.* v. *United States*, 282 U. S. 344 (1931). Otherwise, any consequent search or seizure is deemed illegal. *Giordenello* v. *United States*, 357 U. S. 480 (1958).

The Procedures In the Case at Bar Do Not Meet the Requirements of the Fourth Amendment.

In the case at bar, petitioner was not the subject of criminal arrest. The warrant directed the Immigration officers to take him into custody, pending proceedings to deport him from the United States (R. 33; 34-37). It was issued by and made returnable to a subordinate official within the Department of Justice, not a judicial officer. It contained no directive or authorization to search or seize. It was not based on a finding of probable cause and was unsupported by oath or affirmation. A deliberate decision had been made to institute such deportation proceedings and not to prosecute for the crime of illegal entry, at that time (R. 218-220).

It is established that the issuance of such a deportation warrant is not a criminal procedure. *Harisiades* v. *Shaughnessey*, 342 U. S. 580 (1952); cf. *Bilokumsky* v. *Tod*, 263 U. S. 149 (1923). The process does not need sworn statements as to probable cause; such a former requirement has been repealed. 8 U. S. C. 1252(a); cf. former Sec. 282, Title 8, U. S. C. For gradual weakening of procedural safeguards in these cases, compare Rule 22, Reg. of Sec. of Labor under Immigration Act of 1917 with Part 150, Reg. of Attorney Gen. of 1941, 6 F. R. 68 and Part 242, Reg. of Attorney Gen. of 1952, 8 C. F. R. 242.1 *et seq.* Furthermore, all Constitutional safeguards designed to protect the rights of persons charged with the commission of a crime, are not applicable to those taken into custody pursuant to an Immigration warrant. For instance, such persons do not have the right to bail, or a jury trial in the Immigration proceedings. *Marcello* v. *Bonds*, 349 U. S. 302 (1955); *Carlson* v. *Landon*, 342 U. S. 524 (1952). Nor does the Constitutional provision against *ex post facto* laws apply to such proceedings. *Harisiades* v. *Shaughnessey*, *supra*. Such persons furthermore do not appear before a judicial officer and are entitled to counsel only at the time of the formal Immigration hearing (35; cf. 30).

The present provisions of Rule 41 concerning the use of search warrants in criminal cases are derived, with one minor procedural change, from the Espionage Act of June 15, 1917, Tit. 11, 40 Stat. 217; *Revisor's Notes to Rule 41*. That Act prohibited the use of search warrants in connection with deportation proceedings. *Colyer* v. *Skeffington*, *supra*, at page 45.

From the foregoing, it is clear that an Immigration warrant, issued by agents of the Department of Justice, is not a warrant charging the alien with the commission of a

crime. It also is clear that it is an administrative procedure which does not conform to the requirements of the Fourth Amendment. Therefore it cannot be a lawful basis for a general search and seizure of an alien and his effects, which produces evidence later used to prosecute the alien for a crime. *Nathanson* v. *United States*, 290 U. S. 41 (1933); *United States* v. *Wong Quong Wong*, 94 Fed. 832 (D. Vt. 1899), cited with approval in *United States* v. *Shaughnessy*, 195 F. 2d 964 at 968 (2d Cir. 1952), reversed on other grounds, 345 U. S. 206; *cf. Giordenello* v. *United States*, 357 U. S. 480 (1958); *Robinson* v. *Richardson*, 13 Gray 454 (Mass. 1856), cited with approval by the Supreme Court of the United States in *Boyd* v. *United States*, 116 U. S. 616 at 629 (1886). See also the unqualified opinion of Chafee, Free Speech in the United States (1946) at pp. 204, 205.

Congress has recognized that even in time of war, if arrests on executive warrant should be required as emergency measures there should be safeguards "to insure the observance of procedural due process of law" in order to preserve any semblance of the Bill of Rights. See "Emergency Detention Act", Title II, Internal Security Act of 1950, 64 Stat 987; H. R. Rep. No. 2980, 81st Cong. 2d Sess. (1950) reported at 1950 Code Cong. Serv., pp. 3886-3922*.

An administrative procedure such as that employed by the Department of Justice in the case at bar, under which the Attorney General is accountable only to himself, without any of the safeguards discussed above, cannot and should not be the basis for a search and seizure of a man and his effects to procure evidence for use in the prosecution of a capital crime. Such administrative procedures

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* The legislation was enacted by Congress over a veto by the President which was based primarily upon the refusal of Congress to provide for suspending habeas corpus. See Sutherland, "Freedom and Internal Security", 64 Harv. L. Rev. 383 at 395 (1950).

have characterized in our time the police states of Nazi Germany, Soviet Russia and their satellites, but are incompatible with the mores of a free society.

The rule of law established by this Court in the case at bar will be applicable in practice not to persons judicially determined to be aliens, but to all whom the Department of Justice may believe to be "alien" upon information satisfactory to itself. In a nation of immigrant stock, whether first or eighth generation, the Court may find no more enlightening guide to a sound decision than the letter and the spirit of the Fourth Amendment, written by men who had suffered for freedom and were dedicated to its future preservation:

> *"The right of the people to be secure in their persons, houses, papers and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath, or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."*

Conclusion.

Rights granted to all by the Fourth and Fifth Amendments to the Constitution of the United States have been denied to the petitioner in the case at bar.

The judgment below must be reversed, and the case remanded for further proceedings not inconsistent with the decision of this Court.

Respectfully submitted,

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APPENDIX A.

[Constitutional and Statutory Provisions]

1.

Fourth Amendment to the Constitution of the United States of America.

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

2.

Fifth Amendment to the Constitution of the United States of America.

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

3.

18 U. S. C. §794. Gathering or delivering defense information to aid foreign government

(a) Whoever, with intent or reason to believe that it is to be used to the injury of the United States or to the advantage of a foreign nation, communicates, delivers, or transmits, or attempts to communicate, deliver, or transmit, to any foreign government, or to any faction or party

or military or naval force within a foreign country, whether recognized or unrecognized by the United States, or to any representative, officer, agent, employee, subject, or citizen thereof, either directly or indirectly, any document, writing, code book, signal book, sketch, photograph, photographic negative, blueprint, plan, map, model, note, instrument, appliance, or information relating to the national defense, shall be punished by death or by imprisonment for any term of years or for life.

(b) Whoever, in time of war, with intent that the same shall be communicated to the enemy, collects, records, publishes, or communicates, or attempts to elicit any information with respect to the movement, numbers, description, condition, or disposition of any of the Armed Forces, ships, aircraft, or war materials of the United States, or with respect to the plans or conduct, or supposed plans or conduct of any naval or military operations, or with respect to any works or measures undertaken for or connected with, or intended for the fortification or defense of any place, or any other information relating to the public defense, which might be useful to the enemy, shall be punished by death or by imprisonment for any term of years or for life.

(c) If two or more persons conspire to violate this section, and one or more of such persons do any act to effect the object of the conspiracy, each of the parties to such conspiracy shall be subject to the punishment provided for the offense which is the object of such conspiracy. As amended Sept. 3, 1954, c. 1261, Title II, §201, 68 Stat. 1219.

4.

18 U. S. C. §793. Gathering, transmitting, or losing defense information

(a) Whoever, for the purpose of obtaining information respecting the national defense with intent or reason to

believe that the information is to be used to the injury of the United States, or to the advantage of any foreign nation, goes upon, enters, flies over, or otherwise obtains information concerning any vessel, aircraft, work of defense, navy yard, naval station, submarine base, fueling station, fort, battery, torpedo station, dockyard, canal, railroad, arsenal, camp, factory, mine, telegraph, telephone, wireless, or signal, station, building, office, research laboratory or station or other place connected with the national defense owned or constructed, or in progress of construction by the United States or under the control of the United States, or of any of its officers, departments, or agencies, or within the exclusive jurisdiction of the United States, or any place in which any vessel, aircraft, arms, munitions, or other materials or instruments for use in time of war are being made, prepared, repaired, stored, or are the subject of research or development, under any contract or agreement with the United States, or any department or agency thereof, or with any person on behalf of the United States, or otherwise on behalf of the United States, or any prohibited place so designated by the President by proclamation in time of war or in case of national emergency in which anything for the use of the Army, Navy, or Air Force is being prepared or constructed or stored, information as to which prohibited place the President has determined would be prejudicial to the national defense; or

(b) Whoever, for the purpose aforesaid, and with like intent or reason to believe, copies, takes, makes, or obtains, or attempts to copy, take, make, or obtain, any sketch, photograph, photographic negative, blueprint, plan, map, model, instrument, appliance, document, writing, or note of anything connected with the national defense; or

(c) Whoever, for the purpose aforesaid, receives or obtains or agrees or attempts to receive or obtain from any person, or from any source whatever, any document, writing, code book, signal book, sketch, photograph, photo-

graphic negative, blueprint, plan, map, model, instrument, appliance, or note, of anything connected with the national defense, knowing or having reason to believe, at the time he receives or obtains, or agrees or attempts to receive or obtain it, that it has been or will be obtained, taken, made, or disposed of by any person contrary to the provisions of this chapter; or

(d) Whoever, lawfully having possession of, access to, control over, or being entrusted with any document, writing, code book, signal book, sketch, photograph, photographic negative, blueprint, plan, map, model, instrument, appliance, or note relating to the national defense, or information relating to the national defense which information the possessor has reason to believe could be used to the injury of the United States or to the advantage of any foreign nation, willfully communicates, delivers, transmits or causes to be communicated, delivered, or transmitted or attempts to communicate, deliver, transmit or cause to be communicated, delivered or transmitted the same to any person not entitled to receive it, or willfully retains the same and fails to deliver it on demand to the officer or employee of the United States entitled to receive it; or

(e) Whoever having unauthorized possession of, access to, or control over any document, writing, code book, signal book, sketch, photograph, photographic negative, blueprint, plan, map, model, instrument, appliance, or note relating to the national defense, or information relating to the national defense which information the possessor has reason to believe could be used to the injury of the United States or to the advantage of any foreign nation, willfully communicates, delivers, transmits or causes to be communicated, delivered, or transmitted, or attempts to communicate, deliver, transmit or cause to be communicated, delivered, or transmitted the same to any person not entitled to receive it, or willfully retains the same and fails

to deliver it to the officer or employee of the United States entitled to receive it; or

(f) Whoever, being entrusted with or having lawful possession or control of any document, writing, code book, signal book, sketch, photograph, photographic negative, blueprint, plan, map, model, instrument, appliance, note, or information, relating to the national defense, (1) through gross negligence permits the same to be removed from its proper place of custody or delivered to anyone in violation of his trust, or to be lost, stolen, abstracted, or destroyed, or (2) having knowledge that the same has been illegally removed from its proper place of custody or delivered to anyone in violation of his trust, or lost, or stolen, abstracted, or destroyed, and fails to make prompt report of such loss, theft, abstraction, or destruction to his superior officer—

Shall be fined not more than $10,000 or imprisoned not more than ten years, or both.

(g) If two or more persons conspire to violate any of the foregoing provisions of this section, and one or more of such persons do any act to effect the object of the conspiracy, each of the parties to such conspiracy shall be subject to the punishment provided for the offense which is the object of such conspiracy. June 25, 1948, c. 645, §1, 62 Stat. 736, amended Sept. 23, 1950, c. 1024, §18, 64 Stat.——.

5.

18 U. S. C. §951. Agents of foreign governments

Whoever, other than a diplomatic or consular officer or attache, acts in the United States as an agent of a foreign government without prior notification to the Secretary of State, shall be fined not more than $5,000 or imprisoned not more than ten years, or both. June 25, 1948, c. 645, 62 Stat. 743.

Appendix A.

6.

18 U. S. C. 371. Conspiracy to commit offense or to defraud United States

If two or more persons conspire either to commit any offense against the United States, or to defraud the United States, or any agency thereof in any manner or for any purpose, and one or more of such persons do any act to effect the object of the conspiracy, each shall be fined not more than $10,000 or imprisoned not more than five years, or both.

If, however, the offense, the commission of which is the object of the conspiracy, is a misdemeanor only, the punishment for such conspiracy shall not exceed the maximum punishment provided for such misdemeanor. June 25, 1948, c. 645, 62 Stat. 701.

APPENDIX B.

Evidence of Espionage Obtained by the Department of Justice Prior to Abel's Detention for Deportation on June 21, 1957.

Date Obtained	Exhibit No. and Description	Record
May 15, 1957 (R. 583)	5—Photo of Prospect Park drop	R. 335, 337
May 12, 1957 (R. 507-528)	18—Quebec message	R. 401, 530
May 12, 1957 (R. 507-511-532)	19—"Ermas" birth certificate	R. 427, 429
May 4, 1957 (R. 439-441)	23—Hollow Finnish coin	R. 441, 443
May 12, 1957 (R. 448, 507-514)	24—Radio Receiving Set	R. 446, 447
May 12, 1957 (R. 507-514)	25—Head phones	R. 447, 448
May 12, 1957 (R. 448, 514)	26—Copper plate and microscope lens	R. 448, 449
May 12, 1957 (R. 523)	27—Spectroscopic film	R. 451, 452
May 12, 1957 (R. 453-455, 507-514)	28—Paper on color photography	R. 453, 455
May 12, 1957 (R. 453-455, 507-514)	29—Paper on use of Vacuum Board	R. 453, 455
May 16, 1957 (R. 541)	31—Old screw	R. 460
May 12, 1957 (R. 462)	33—Camera	R. 462, 463
May 21, 1957 (R. 599-600)	34—Asko message	R. 463, 601

Appendix B.

Date Obtained	Exhibit No. and Description	Record
May 12, 1957 (R. 507-8)	39—Box of Espionage materials	R. 508
May 12, 1957 (R. 507-9)	40—Diagram	R. 509, 510
May 12, 1957 (R. 507-511)	41—Picture of Hole	R. 511, 513
May 12, 1957 (R. 507-511)	42—Wrapper	R. 511, 513
May 12, 1957 (R. 516)	43—9 foreign coins	R. 516
May 12, 1957 (R. 520)	44—Spectroscopic film	R. 520
May 12, 1957 (R. 507-524)	45—Hollow bolt	R. 524, 530
May 12, 1957 (R. 507-528)	46—Microfilm of Quebec message found	R. 528, 530
May 16, 1957 (R. 541)	48—Bolt	R. 541
June, 1953 (R. 575-576)	60—Photograph	R. 570, 581
June, 1953 (R. 574-575)	61—Hollow nickel	R. 575, 581
June, 1953 (R. 574-576)	62—Message in Hollow Nickel	R. 576, 581
May 15, 1957 (R. 583)	65—Hollow screw	R. 584, 588
May 15, 1957 (R. 583)	66—Photograph of drop area	R. 585, 586
May 15, 1957 (R. 587)	67—Message in hollow screw	R. 587, 588
May, 1957 (R. 478)	Hayhanen's Testimony	R. 286-500
May 12, 1957 (R. 507)	Gamber's Testimony	R. 507-515

Appendix B.

Date Obtained	Exhibit No. and Description	Record
May 12, 1957 (R. 477)	Mulhern's Testimony	R. 515-522
May, 1957 (R. 524, 525)	Webb's Testimony	R. 525-539
May 16, 1957 (R. 541)	Steel's Testimony	R. 541-542
June, 1953 (R. 569-574)	Bozart's Testimony	R. 569-571
June, 1953 (R. 572-573)	Milley's Testimony	R. 572-573
June, 1953 (R. 574)	O'Connor's Testimony	R. 574-577
May 15, 1957 (R. 582)	Millar's Testimony	R. 582-586
May, 1957 (R. 585)	Webb's Testimony	R. 587-588
May 23, 1957 (R. 644)	Heiner's Testimony	R. 644-649
May 24, 1957 (R. 650)	McDonald's Testimony	R. 649-653
June 13, 1957 (R. 654)	Carlson's Testimony	R. 654-655
June 13, 1957 (R. 656)	Sowick's Testimony	R. 655-657

[Additional evidence introduced at the trial undoubtedly was in the hands of the Department of Justice prior to June 21, 1957 but no date for its acquisition is fixed in the Record.]

APPENDIX "C"

List of Items Seized on the Deportation Warrant at the Hotel Latham on June 21, 1957 Which Were Used by the Department of Justice in the Espionage Case.

A. Items seized at the Latham which were introduced as exhibits at the espionage trial.

Exhibit No.	Description	Seized at Latham	Identified	Received
21	Queen Elizabeth message	R. 48-49(6)	R. 432	
77	Graph paper with numbers	R. 38(16)	R. 665	R. 666
78	Martin Collins birth certificate	R. 45(bot.)	R. 666	R. 667
79	Emil Goldfus birth certificate	R. 45(bot.)	R. 668	R. 669
80	International certificate of vaccination	R. 39(30)	R. 669	R. 671
81	East River Savings Bank book $1,386.22	R. 45(l. 8)	R. 669	R. 671
87	Hollow pencil	R. 46(l. 23)	R. 694	R. 726
88	Hollow block of wood containing book with numbers	R. 46(l. 21)	R. 694	R. 724
97	Microfilms, including:	R. 727(l. 21)	R. 727	R. 728
98	Radio Receiving Schedule	R. 727(l. 35)	R. 727	R. 728
98A	Two letters	R. 728(l. 1)	R. 727	R. 728
99	Microfilms	R. 728(l. 6)	R. 728	

B. Items seized at the Latham, which were used to obtain exhibits introduced at the espionage trial:

Item Seized at Latham	No. and Description of Exhibit Obtained	Intro.	Received
3 bills from Broadway Central (R. 45, l. 9)	74. Registration card and bills from Broadway Central Hotel	R. 635	R. 635

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Item Seized at Latham	No. and Description of Exhibit Obtained	Identified	Received
3 bills from Daytona Plaza Hotel (R. 45, l. 10)	75 Registration Card and bills from Daytona Plaza Hotel	R. 636	R. 636
7 bills from Hotel Latham (R. 45, l. 11)	76 Records of Hotel Latham	R. 658	R. 658
Martin Collins birth certificate (R. 45, bot.)	78A Enlargement of the Martin Collins birth certificate	R. 717	R. 717
	78B, C, D, E, F "	R. 717	R. 717
Birth Certificate of Emil Goldfus (R. 45, bot.)	82 Birth certificate of Emil Robert Goldfus	R. 677	R. 677
"	83 Death Certificate of Emil Robert Goldfus	R. 678	R. 681
Birth Certificate of Martin Collins No. 32024 (R. 45 (bot.), 682)	84 Birth certificate of Esther Wohman No. 32024	R. 681	R. 682
" which bears signature of Dorothy Adams (R. 667)	85 Handwriting samples of Dorothy Adams in charge of writing handwritten certificates for Dept. of Health	R. 683	R. 684
	85A, B Enlargements of 85	R. 716	R. 716
Exhibit 98—radio receiving schedule (R. 727, l. 35)	100 Record of Monitoring radio frequencies at times mentioned in Exhibit 98	R. 746	R. 753

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C. Additional items seized at the Latham, concerning which testimony was offered at the espionage trial:

Hallicrafter short-wave radio aerial of green covered copper wire Kleenex Painter's supplies Lead pencils 2 pieces of paper	Testimony of I.N.S. agent Schoenenberger (R. 663-665)
Magazines Sundry articles	Testimony of F.B.I. agent Kehoe (R. 694)

D. Items seized at the Latham which were used by the Department of Justice to procure a search warrant for espionage materials on June 28, 1957 (R. 48-54, 247-261):

A Hallicrafter short-wave radio.
Emil Goldfus birth certificate.
Martin Collins birth certificate.
International Certificate of Vaccination.
A piece of graph paper containing eight rows of numbers, in groups of five digits.
A scrap of paper containing the following printed message: "I bought a ticket next ship—Queen Elizabeth for next Thursday—1.31. Today I could not come because 3 men are tailing me."
A scrap of paper containing the following hand written note: "In Mex.: Signal 'T' on pole opposite #191 Chihuahua (Chihuahua St) (Fonolia Roma), using side of pole towards roadway. Sat or Sun, Tues, Thur. Met on Mon, Wed, Fri at 3pm movie 'Balmora'."
A slip of paper containing the following typewritten message: "'Balmora', Avenida Oberon, 3 p.m. Display left of entrance. I. 'Is this an interesting picture?'. L. 'Yes. Do you wish to see it, Mr. Brandt?' L. smokes pipe and has red book in left hand."
A slip of paper containing the following typewritten message: Mr. Vladinec, P.O. Box 348. M-w, K-9.

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USSR. Sign 'Arthur'. W. Merkulow, Poste Restante, M-a, USSR (Russia). Sign 'Jack.'

A torn slip of paper containing the following message: "... Will w .... in London 2-3 day while your message arrives. P."

Two wooden pencils.

One mechanical pencil.

A small wooden pencil.

Photographic Frames of microfilm with writing thereon.

Clothing store bill in name of Goldfus.

Camera bag.

Camera.

Numerous lenses and other photographic equipment.

Film.

Aerial.

E. Trial exhibits obtained from items seized on June 28, 1958. (See D, above)

Item Seized	No. and Description of Exhibit at trial		Identified	Received
Rent receipts to 23 Riverside Dr. (R. 259, No. 173)	50	Lease & application for lease at 23 Riverside Dr.	R. 545	R. 546
"	51	Letter terminating lease at 23 Riverside Dr.	R. 545	R. 546
Sales receipt of Eastman Kodak (R. 259, No. 173)	53	Purchase order of Eastman Kodak	R. 555	R. 556
"	54	Sales slip of Eastman Kodak	R. 555	R. 556
"	55	Ledger of Eastman Kodak	R. 555	R. 556
"	56	Accounts receivable page of Eastman Kodak	R. 555	R. 556
Pass book, N.C.B. of N. Y., 96th St. (R. 256, No. 113)	71	Signature card N.C.B. of N. Y., 96th Street	R. 630	R. 631

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Item Seized	No. and Description of Exhibit at trial		Identified	Received
Pass book, N.C.B. of N. Y., Montague St. (R. 260, No. 195)	72	Signature card and records of N.B.C. of N.Y., Montague St.	R. 631	R. 633
Rent receipts of Benjamin Franklin Hotel (R. 253, No. 54)	73	Signature card of Benjamin Franklin Hotel.	R. 634	R. 634

F. Items seized at the Latham used to procure a search warrant on August 16, 1957. (R. 265)

Small wooden pencil

Number of photographic frames of microfilm

G. Trial Exhibits which were seized on the August 16, 1957 search warrant (see F., above):

No. and description	Identified	Received
32—Electric converter—from 6 volts to 110 volts	R. 461	R. 699
89—Roll of Spectroscopic Film	R. 696	R. 699
90—2 sheets of paper with numbers	R. 696	R. 699
91—A screw	R. 696	R. 701
91A—A screw	R. 696	R. 701
92—Flashlight battery	R. 699	R. 700
93—Brass container	R. 699	R. 700
93A—Brass container	R. 699	R. 700
94—Tie Clasp	R. 700	R. 700
95—Tie clasp	R. 700	R. 700
96—Cuff links	R. 700	R. 700